85-197

Supreme Court, U.S.
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No. .....

In the Supreme Court of the United States

October Term 1985

ROYSTON E. POTTER,

Petitioner,

vs.

MURRAY CITY, a municipal corporation, CALVIN G. GILLEN, individually and in his capacity as Chief of Police of Murray City, MURRAY CITY CIVIL SERVICE COMMISSION, THE HONORABLE SCOTT M. MATHESON, as Governor of the State of Utah, THE HONORABLE DAVID L. WILKINSON, as Attorney General of the State of Utah, STATE OF UTAH and THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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July 26, 1985

QUESTIONS PRESENTED

1. Did the lower courts err in granting and affirming respondents' motions for summary judgment and in denying petitioner's motion for summary judgment?

2. Is petitioner's religious belief in, and practice of, plural marriage constitutionally protected under the First and Fourteenth Amendments to the United States Constitution?

3. Have the respondents established a compelling interest in prohibiting plural marriage?

4. Has the practice of plural marriage been demonstrated to be harmful to the public peace, safety or order?

5. Are there less restrictive alternatives than absolute prohibition of the practice of plural marriage?

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, Royston E. Potter, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on April 28, 1985.

OPINION BELOW

The opinion of the Court of Appeals, is reported at 706 F.2d 1065 (10th Cir. 1985) and appears in Appendix A hereto. The opinion rendered by the District Court for the District of Utah, Central Division, appears in Appendix B hereto and is reported at 585 F.Supp. 1126 (D. Utah 1984).

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on April 28, 1985 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

1. *United States Code*, Title 42 Section 1983:

   Civil Action for deprivation of rights. Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. United States Constitution, First Amendment:

   Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

3. United States Constitution, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Utah State Constitution, Article III, Section 1:

> First:—Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited.

5. Utah Code Ann. §76-7-101(1) and (2):

> Bigamy—Defense—Testimony.—(1) A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, he purports to marry another person or cohabits with another person.
>
> (2) Bigamy is felony of the third degree.

STATEMENT OF THE CASE

Petitioner brought an action in the District Court for the State of Utah for a declaratory judgment that Utah's anti-plural marriage laws violate petitioner's First Amendment rights to freely practice his religion and for damages for violation of his civil rights as a result of his termination from the Murray City Police Department. The parties filed cross motions for summary judgment in which the following material facts were not in dispute:

1. The petitioner, Royston E. Potter, is 31 years of age and resides in Salt Lake County, Utah. On February 5, 1972, in a civil and religious ceremony, he married Denise Hoagland in the LDS ("Mormon") Temple at Idaho Falls, Idaho. Tenth Circuit Record on Appeal (hereinafter "ROA"), Vol. VII, pp. 4, 16 and 17.

2. Mr. Potter is a deeply religious man and holds a genuine religious belief, faith and conviction in the principle and practice of plural marriage which is, in Mr. Potter's belief, a doctrinal and biblical ordinance necessary to his exaltation. ROA, Vol. VII, pp. 29-57; ROA, Vol. VII, p. 575.

3. On April 26, 1980, Mr. Potter, in a religious ceremony, married his second wife, Vera. ROA. Vol. VII, pp. 56-57.

4. Mr. Potter's wives, Denise and Vera, consented to a plural marriage relationship. As of December 1, 1982, Mr. Potter had five children born of these relationships. Petitioner's wives and children receive adequate care, love and attention and want for no necessity of life. ROA, Vol. VII, p. 70; ROA, Vol. III, p. 575.

5. Petitioner was hired by the Murray City Police Department in September of 1980 as a police officer. His work record, according to Police Chief Calvin L. Gillen, is exemplary. Following his termination on December 1, 1982, an administrative hearing was conducted by the Murray City Civil Service Commission to review the decision of Chief Gillen. The decision of the Civil Service Commission appears in Appendix C. There was no evidence before the Civil Service Commission, nor is there evidence in the record, that Petitioner's practice of

plural marriage had an impact upon his job performance. ROA, Vol. III, p. 576.

6. Article III, Section 1, and Article XXIV, Section 2, of the Constitution of the State of Utah prohibit the practice of plural marriage. *Utah Code Ann.*, §76-7-101 (1953), prohibits and makes criminal the practices of bigamy and unlawful cohabitation.

7. The State of Utah has admitted that there is "no indication whatsoever that the Utah Legislature has ever, since statehood was achieved in 1896, attempted to make the fundamentally sociological judgment of whether or not monogamous marriage is empirically superior to polygamy." ROA, Vol. II, p. 361. The State of Utah, further admits that it "has never considered on a policy basis whether these particular laws are wise or not. Utah has not had occasion, because of the federal mandate reflected in the [Utah] Constitution, to give public policy consideration to these particular issues." ROA, Vol. VI, p. 6.

8. Petitioner was terminated by Murray City on December 1, 1982, (1) for failure to uphold his oath of office; (2) for failure to comply with Article III, Section 1, of the Utah Constitution; and (3) for failure to comply with §76-6-101(1), Utah Code Ann. (1953, as amended). ROA, Vol. III, p. 576.

9. The Murray City Civil Service Commission ordered that Mr. Potter be reinstated if he forthwith abandoned the practice of plural marriage. Upon failure to do so within five days, then the decision to terminate Mr. Potter would be affirmed. ROA, Vol. III, p. 577.

10. As a result of petitioner's termination, he filed an application for unemployment benefits. Murray City contested payment of benefits by the Industrial Commission of Utah, Department of Employment Security. The Industrial Commission's decision, which appears in Appendix D, finds that Mr. Potter's conduct did not render him unsuitable to perform the tasks of a police officer, that the Salt Lake County Attorney had refused to prosecute Mr. Potter, and that there has been general public acceptance that similar cases have not been pursued by law enforcement bodies. This decision also finds that Mr. Potter has not lost his usefulness, effectiveness or credibility in the community, with Murray City or with his fellow officers. ROA, Vol. III, p. 578.

11. If Article III, Section 1 and Section 76-6-101, are found to be unconstitutional, in accordance with the prayer of petitioner's Amended Complaint, then Chief Gillen would reinstate Mr. Potter to his position as a Murray City police officer. ROA, Vol. III, p. 576.

12. There were no affidavits, evidence or empirical data before the trial court to show that the practice of plural marriage is harmful to the public peace, safety or order. ROA, Vol. III, p. 578.

13. The State rspondents conceded in oral argument that the government of the State of Utah has "never asserted that polygamy is inherently or demonstrably a moral evil with direct consequences of a negative nature to its participants or to its neighbors." ROA, Vol. IX, p. 63.

14. There are between 5,000 and 10,000 individual

family members of polygamist families currently residing in Utah. ROA, Vol. IV, p. 619.

15. The State has acquiesced in being a party to this suit. ROA, Vol. VI, p. 11.

The District Court denied petitioner's motion for summary judgment and granted the respondent's motions for summary judgment. On appeal, the decision was modified by the Tenth Circuit in that it was held there was no jurisdictional basis to make the United States a party to the suit. The decision was otherwise affirmed.

REASONS FOR GRANTING THE WRIT

1. THIS CASE RAISES SIGNIFICANT AND RECURRING QUESTIONS RELATING TO THE BALANCING OF GOVERNMENT INTERESTS AGAINST CONFLICTING RELIGIOUS PRACTICES.

In *Reynolds v. United States,* 98 U.S. (8 Otto) 145 (1878), the United States Supreme Court upheld a conviction for the practice of bigamy (polygamy) against a challenge that the congressional antibigamy statute violated the defendant's right to the free exercise of his religion. The Court directed its inquiry to the "guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong." *Id.* at 162. The Court distinguished between religious beliefs and actions based on religious beliefs, holding that only religious belief and opinion, not practice, are protected by the First Amendment. *Id.* at 166.

This belief/actions distinction was rejected by the

Court in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), where the Court reversed the convictions of some Jehovah's Witnesses for violating a state statute requiring a person to obtain a certificate prior to soliciting for any alleged religious cause from anyone other than a member of the organization. The Court recognized that religious conduct is not without First Amendment protection and found the convictions to be improper "in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state. . ." *Id.* at 311.

In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court firmly established the modern test for determining the constitionality of governmental regulation that infringes on the constitutional right of free exercise of religion. The Court held that an otherwise neutral statute that burdens an individual's free exercise of religion may be justified only by a compelling interest, but it is also "incumbent upon the [state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Id.* at 407 (footnote omitted). The *Sherbert* Court then held that the denial of unemployment compensation to a member of the Seventh-Day Adventist Church, who was discharged by her state employer because she would not work on Saturday, the Sabbath day of her faith, was unconstitutional. *Id.* at 399.

The modern test in the area of free exercise of religion was further enunciated in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In that case, the Amish belief that salvation requires life in a church community apart from the

secular world and its influence, conflicted with a state statute requiring compulsory school attendance by children until the age of sixteen. This belief was not merely a matter of personal preference but one of deep religious conviction and intimately related to daily living. The Court employed a strict scrutiny test in examinging the statute, stating that "it must appear either that the state does not deny the free exercise of religious belief by its requirement or that there is a state interest claiming protection under the Free Exercise Clause." A state interest in requiring compulsory education was recognized but the Court stated that interest was not totally free from a balancing process. *Id.* at 214.

The Court found that an exemption from the law for the Amish would not overly burden the state in achieving its legitimate end but the Amish would be unjustifiably burdened in their free exercise of religion if not exempted from the requirements of the law. The Court concluded "only those interests of the highest order can over balance legitimate claims to the free exercise of religion." *Id.* at 215. Thus, not only must a compelling or overriding state interest be demonstrated but also the Court must balance the burden on the exercise of the right as compared to the burden on the state in allowing an exemption. Additionally, the Court must determine whether there exists a less restrictive method of regulating the religious practice.

The *Reynolds,* decision, despite the subsequent implicit rejection of its holding, is still cited as viable precedent in the area of free exercise. That decision, however, must be viewed in light of the circumstances of the

time. Even though the First Amendment was intended to protect the numerous and divergent religious sects of America from governmental interference and societal persecution, the Mormon Church met with very violent social and governmental hostility. See Morill Act of 1862, Ch. 126, 12 Stat. 501 (1862); Edmunds Act of 1882, Ch. 47, 22 Stat. 30 (1882) and Edmunds-Tucker Act, 24 Stat. 635 (1888). Nineteenth Century America was thoroughly immersed in the morality and values of the Victorian Era and polygamy was viewed as unchristian, a moral opprobrium. The rhetoric of the Court in *Reynolds,* however, was not supported by evidence in the record but reflected instead the supposed social mores of the time. Accordingly, the rationale of *Reynolds,* deeming polygamy odious and comparing the practice to human sacrifice, simply cannot be disregarded as the District Court below suggests. ROA Vol. V, p. 793 (Appendix B, p. 34). Since *Reynolds,* culture and society in America have changed dramatically along with the analysis by the Court in free exercise cases.

Thus, although a balancing test has been firmly established in constitutional law, the decisions are unclear as to how governmental needs actually are to be balanced against individual religious practices. The decisions of the Supreme Court itself offer little guidance. *See e.g. Thomas v. Review Board,* 450 U.S. 707 (1981) (no compelling interest existed to deny Jehovah's Witness unemployment compensation where he terminated his employment because he was transferred from roll foundry to a department that produced turrets for military tanks); *United States v. Lee,* 455 U.S. 252, 258-60 (1982) (fed-

eral government can require Amish to pay social security taxes contrary to their religious beliefs because vitality of social security system requires mandatory participation by all).

Lower courts similarly conflict in their application of the balancing test. *See e.g. Palmer v. Board of Education,* 603 F.2d 1271 (7th Cir. 1979) (probationary teacher does not have protected interest to disregard prescribed curriculum which conflicted with religious belief); *McGinnis v. U.S. Postal Service,* 512 F.Supp. 517 (N.D. Cal. 1980) (postal clerk refusing to distribute draft registration materials as violative of her religious beliefs entitled to injunctive relief against imminent dismissal).

Polygamists continue to live and practice in Utah as they have done for over 100 years. During that time it has never been demonstrated that polygamy is harmful to the public safety, peace or order. The test employed in *Reynolds* was belief/actions pursuant to which polygamy was found to be unprotected under the First Amendment. That religious practice should now be re-examined and balanced according to the new constitutional tests which have evolved.

The instant case offers the Supreme Court the opportunity to re-examine the vitality of *Reynolds* and to clarify the scope of the balancing test under the free exercise clause of the U.S. Constitution.

2. THERE HAS BEEN NO SHOWING OF A COMPELLING STATE INTEREST AND THAT THERE ARE NO LESS RESTRIC-

TIVE ALTERNATIVES FOR REGULATING PLURAL MARRIAGE.

Fundamental rights guaranteed under the First and Fourteenth Amendments cannot be restricted unless there has been a showing of a compelling state interest and that no less burdensome alternatives exist. *Yoder, supra; Roe v. Wade,* 410 U.S. 113 (1979). These cases clearly place the burden on the State to come forward with affirmative evidence and to *demonstrate* a compelling interest and that no less restrictive alternatives exist, something the State of Utah and Murray City have been unable to do.

Despite the admissions by the State of Utah that it has not examined polygamy since 1896 the District Court, while recognizing the State's burden, incorrectly took notice that "the prohibition of polygamy as provided by its Constitution and laws, continues to be its settled public policy as does its commitment to monogamy as the cornerstone of its regulation of marriage, about which are clustered enumerable supportive laws passed by its legislature over the succeeding years." Appendix B p. 23-24. The Circuit Court agreed with this analysis concluding "[m]onogamy is inextricably woven into the fabric of our society." Appendix A, p. 10-11. No evidence was presented however, demonstrating that the laws of Utah are based on a commitment to monogamy; no evidence was presented demonstrating a compelling interest.

Even assuming *arguendo* the existence of such a public policy, this argument is, as the District Court pointed out, an "oversimplification or begging of the ques-

tion." Appendix B, p. 25. It used to be the public policy of some states to require separate facilities for blacks, to require poll tests and to require blacks to ride in the back of the bus. To discharge Mr. Potter because his conduct is not in accord with an unconstitutional public policy is itself unconstitutional. See *Leonard v. City of Columbus*, 705 F.2d 1299 (11th Cir. 1983). An unconstitutional law cannot be valid public policy.

The State of Utah has argued that an exemption for religiously based polygamy would create legal chaos, would be administratively unworkable and impossible to implement. This litany of horrors, however, has not occurred since plural marriage arrived in Salt Lake City on July 24, 1847. Utah's laws have accommodated the practice of plural marriage in Utah for over 135 years. Further this sort of speculation is impermissible and cannot resolve the State's burden to present evidence of its interest. *Sherbert v. Verner*, 374 U.S. at 407. Additionally, as the District Court point out, "such cases as *Brown v. Board of Education of Topeka*. 347 U.S. 483 (1954), and *Miranda v. Arizona*, 384 U.S. 435 (1966), teach us that the bother of responding to constitutional mandates does not justify their disregard." Appendix B, p. 25. The State defendants have not presented any evidence to support the claim that laws will become unworkable, nor how, nor why they will become unworkable. Nor have defendants cited any case law to support these claims. Indeed, the fact that at least ten thousand members of polygamist families currently live and operate under the laws of Utah rebuts any assertion that the system is structured only to accommodate monogamy.

Petitioner's conduct here is based on fundamental rights and, although the District Court and the Court of Appeals correctly recognized the State's burden, no such showing of a compelling interest was made by defendants nor found by the Court. In order to prevail and meet the constitutional burden, the defendants *must* demonstrate a compelling interest in the regulation of Mr. Potter's personal life *and* that there is no less restrictive method of achieving governmental ends. The latter constitutional test was ignored by the defendants in their briefing and the lower courts in their analysis. The burden cannot be satisfied through mere speculation; the failure of the courts below to require such a showing was error.

3. THE DECISIONS OF THE COURTS BELOW CONFLICT WITH THE DECISIONS OF OTHER COURTS AS TO THE EXISTENCE AND EXTENT OF A PRIVACY RIGHT UNDER THE FOURTEENTH AMENDMENT.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the United States Supreme Court held that penumbral emanations from specific guarantees in the Bill of Rights create constitutionally protected zones of privacy which surround the marital relationship and held that Connecticut statutes proscribing the use of contraceptives violated that marital zone of privacy. *Id.* at 484-86, 495-97 (Goldberg J., concurring).

Although a constitutional right of privacy is clearly recognized as a fundamental right, *Roe v. Wade, supra*, lower courts have been unable to agree as to the extent

of that right. Accordingly, the decisions in this area reflect vastly divergent results and analytical approaches. The Tenth Circuit here declined to extend the right of privacy to protect polygamous marriages, stating that no authority existed for so doing. See p. 11 of Appendix A hereto. That holding conflicts with the rationale adopted by several other circuits. See *Briggs v. North Muskegon Police Dept.*, 563 F.Supp. 585 (W.D. Mich. 1983) aff'd, 746 F.2d 1475 (5th Cir. 1984); *Thorne v. City of El Segundo,* 726 F.2d 459 (9th Cir. 1983); *Harwick v. Bowers,* ..... F.2d, ..., (11th Cir. 1985), 53 U.S.L.W. 2591 (June 4, 1985). These courts have recognized the existence of a fundamental right of sexual privacy. The basis for these decisions is focused not on the specific conduct involved by the right asserted; it is not bigamy nor cohabitation, but the right to privacy.

In *Briggs v. North Muskegon Police Dept., supra,* the Court awarded damages under Section 1983 to a police officer who had been dismissed for cohabiting with a woman not his wife. The District Court concluded that "better logic" supported the constitutional right of sexual privacy and held that "the privacy and associational interests implicated here are sufficiently fundamental to warrant scrutiny of defendants' acts on more than a minimal rationality basis." *Id.* at 590. The Court rejected the notion that an infringement of an important constitutionally protected right is justified simply because of general community disapproval of the protected conduct, and that the purpose of constitutional protection "is to prevent such majoritarian coercion." *Id.*

In *Hardwick, supra,* the Eleventh Circuit was asked

to rule whether a Georgia sodomy statute infringed on a constitutional right of privacy of a homosexual arrested for committing sodomy with a consenting male adult in his own home. The court there held that the statute infringed upon fundamental constitutional rights and stated:

> In sum, the Supreme Court's analysis of the right to privacy in Griswold, Eisenstadt, and Stanley v. Georgia, 394 U.S. 557 (1969), leads to the conclusion that the Georgia statute implicates a fundamental right of the homosexual. The activity he hopes to engage in is quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation. 53 U.S.L.W. at 2592.

The court then remanded the case for a determination of whether the state had compelling interests and whether there were any less restrictive alternatives. See also *Thorne v. City of El Segundo, supra,* (questioning into and reliance on sexual life of plaintiff in rejecting plaintiff's job application violated plaintiff's constitutionally protected interests when such conduct did not interfere with job performance.)

In *Shawgo v. Spradlin,* 701 F.2d 470 (5th Cir. 1983) *cert. denied, sub nom Whisenhunt v. Spradlin,* ..... U.S. ....., 104 S.Ct. 404, however, a contrary result was achieved. In that case, the Fifth Circuit held that the discipline of two police officers for cohabitation and subsequent dismissal of one did not violate their constitutional rights and held that the right of privacy could not be extended to cover the conduct at issue.

The conflicts in the decisions dealing with sexual privacy demonstrate that guidance from the Supreme Court is needed in this important area of constitutional law and justify a grant of certiorari to review the decision of the court below in this case.

CONCLUSION

This case raises significant and recurring questions with regard to the balancing of government interests against the free exercise of religion. It presents an opportunity to re-examine *Reynolds* in light of the modern tests dealing with free exercise of religion and to clarify the evidentiary showing required of a state in establishing its compelling interest and the lack of less restrictive alternatives. Finally, the decision below presents a the right of privacy. For these reasons, a writ of certiorari should issue to review the decision of the Tenth Circuit.

Respectfully submitted,

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Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July, 1985, forty copies of the Petition for Writ of Certiorari were mailed, postage prepaid to Clerk of the Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543 and three copies were mailed, postage prepaid to the following:

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I further certify that all parties required to be served have been served.

/s/
DENNIS V. HASLAM

/s/
NOTARY PUBLIC, Residing in
Salt Lake County, State of Utah

Subscribed and sworn to before me this 26th day of July, 1985.

My Commission Expires: April 12, 1988